

1995

Steven M. Stilling v. Utah Board of Pardons and Parole : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Stilling v. Utah Board of Pardons and Parole*, No. 950818 (Utah Court of Appeals, 1995).
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IN THE UTAH COURT OF APPEALS

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STEVEN M. STILLING,	:	
Petitioner/Appellee,	:	Case No. 950818-CA
v.	:	
UTAH BOARD OF PARDONS AND	:	Priority No. 3
PAROLE; O. LANE McCOTTER,	:	
Executive Director, Utah	:	
Department of Corrections;	:	
and the STATE OF UTAH,	:	
Respondents/Appellants.	:	

BRIEF OF APPELLANTS

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Leslie A. Lewis, Presiding

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LIST OF ALL PARTIES

To the best of Appellants' knowledge, all interested parties appear in the caption of this Brief.

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PAROLE; O. LANE McCOTTER,	:	
Executive Director, Utah	:	
Department of Corrections;	:	
and the STATE OF UTAH,	:	
	:	
Respondents/Appellants.	:	

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(h) (Supp. 1995).

STATEMENT OF THE ISSUES

1. The district court erred in determining that the Utah Board of Pardons and Parole (the Board) lacks statutory authority to order restitution as a condition of parole.

STANDARD OF REVIEW: The district court's interpretation of a statute presents a question of law that is reviewed for correctness, according no particular deference to the district court's decision. State v. Strader, 902 P.2d 638, 640 (Utah App. 1995).

2. The district court erred in determining that the Board's assessment of restitution as a condition of Stilling's parole violated the Utah Constitution's prohibition against ex post facto laws.

STANDARD OF REVIEW: The district court's conclusion that the Board violated Stilling's rights under the Utah Constitution is a question of law which this Court reviews for correctness. State v. Brown, 853 P.2d 851, 855 (Utah 1992).

3. The district court erred in determining that allowing the Board to assess restitution as a condition of parole exceeds the authority granted it by article VII, section 12 of the Utah Constitution.

STANDARD OF REVIEW: The district court's constitutional interpretation involves a question of law which this Court reviews for correctness. State v. Contrel, 886 P.2d 107, 111 (Utah App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

The text of all constitutional provisions and statutes pertinent to resolution of the issues before this Court is contained in Addendum B of this brief.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Petitioner Steven M. Stilling filed a petition for extraordinary relief against the respondents on July 6, 1994, alleging that the Board violated his rights under the Utah Constitution by ordering restitution as a condition of his parole where no restitution had been ordered by the trial court at the time he was sentenced for the underlying offenses. R. at 1-10.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Stilling moved for summary judgment on July 19, 1995, asserting that by ordering him to make restitution as a condition of parole, the Board (1) exceeded the authority granted it by article VII, section 12 of the Utah Constitution, and (2) violated the Utah Constitution's ban against ex post facto laws. R. at 67-76. The district court granted Stilling's motion on October 12, 1995. (A copy of the district court's order is attached hereto as Addendum A.) The district court expressly held that (1) Utah Code Ann. §§ 77-27-5 and 77-27-6 (1995), which address the Board's authority to order restitution, do not allow the Board to order restitution in cases such as this, and (2) application of these sections, which were not effective at the time Stilling was sentenced on the underlying offenses, violates

the Utah Constitution's prohibition against ex post facto laws. R. at 126-135. The district court additionally suggested that permitting the Board to order restitution in the present case would exceed the authority granted under article VII, section 12 of the Utah Constitution by allowing the Board "to don the robe of the judiciary and decide the amount of restitution owed as a result of the underlying criminal act when restitution was not ordered in the original sentencing proceeding." R. at 129.

C. STATEMENT OF RELEVANT FACTS

On February 13, 1985, Steven M. Stilling was sentenced for three aggravated robbery offenses; no restitution was ordered by the district court at the time of sentencing. R. at 22-24. Following hearings on August 13 and 24, 1993, the Board granted Stilling a parole date of May 24, 1994. At that time, the Board further determined that a restitution hearing should be held to determine the amount of restitution, if any, that Stilling must pay as a condition of his parole. R. at 54-56. On April 28, 1994, the Board held a restitution hearing at which Stilling was present. The hearing officer determined that restitution was proper and ordered restitution as a condition of Stilling's parole. R. at 57. Stilling was subsequently paroled on May 24, 1994. R. at 36, 69.

SUMMARY OF ARGUMENT

The district court improperly granted summary judgment in favor of petitioner Stilling. First, the district court erred in determining the Board lacks statutory authority to order restitution as a condition of parole. Second, the district court erred in determining that the Board's assessment of restitution as a condition of Stilling's parole violated the Utah Constitution's prohibition against ex post facto laws. Third, the district court erred in determining that allowing the Board to assess restitution as a condition of parole exceeds the authority granted it by article VII, section 12 of the Utah Constitution. Accordingly, the district court's order granting summary judgment in favor of Stilling should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT THE BOARD LACKS STATUTORY AUTHORITY TO ORDER RESTITUTION AS A CONDITION OF PAROLE

The district court interpreted Utah Code Ann. §§ 77-27-5 and 77-27-6 (1995), which address the Board's authority to order restitution, as prohibiting the Board from assessing restitution as a condition of parole where no restitution had been ordered by the trial court at the time of sentencing. Specifically, the district court held that the Board is authorized to order

restitution in only two limited contexts, (1) when restitution was imposed by the trial court as part of the underlying sentence and (2) when the State, the Department of Corrections, or any other State agency incur costs "that arise due to the petitioner's needs or conduct." However, the district court's interpretation of sections 77-27-5 and 77-27-6 clearly contradicts the plain language of those sections.

It is well settled that a statute should be construed according to its plain language. Utah Sign, Inc. v. Utah Dep't of Transp., 896 P.2d 632, 633 (Utah 1995). Thus, when statutory language is plain and unambiguous, appellate courts do not look beyond it to surmise the legislature's intent. Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989). Moreover, "unambiguous language in the statute may not be interpreted to contradict its plain meaning." Bonham v. Morgan, 788 P.2d 497, 500 (Utah 1989) (per curiam).

At the time of Stilling's parole hearings, section 77-27-5 stated:

(1) (a) The Board of Pardons and Parole shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in . . . all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, restitution ordered, or have their

finest, forfeitures, or restitution remitted, or their sentences commuted or terminated.

Utah Code Ann. § 77-27-5 (1995). Thus, the plain language of this section provides that subject to the limitations prescribed by chapter 27 and by other state laws, the Board has complete authority to order restitution.

One such limitation is contained in section 77-27-5(1)(c), which states in part, "No restitution may be ordered . . . except after a full hearing before the board or the board's appointed examiner in open session." Id. However, this limitation was met in the present case, a fact that Stilling does not contest.

Another limitation is found in section 77-27-5(5), which provides:

In determining when, where, and under what conditions offenders serving sentences may be paroled, pardoned, have restitution ordered, or have their fines or forfeitures remitted, or their sentences commuted or terminated, the Board of Pardons and Parole shall consider whether the persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of Section 76-3-201, as a condition of any parole, pardon, remission of fines or forfeitures, or commutation or termination of sentence.

Id. Under this section, the Board is simply required to consider whether restitution has already been ordered and made in accordance with a trial court's sentencing order before assessing restitution as a condition of parole. Thus, inasmuch as the

trial court did not order restitution at the time of sentencing in the present case, the limitations found in section 77-27-5(5) are not relevant here.

A further clarification of the Board's authority to order restitution was subsequently added in section 77-27-5(1)(e), which states: "The board shall determine restitution in an amount that does not exceed complete restitution if determined by the court in accordance with Section 76-3-201." Utah Code Ann. § 77-27-5(1)(e) (Supp. 1995). The plain language of this section limits the amount of restitution that the Board may assess in cases in which the trial court has already determined the proper amount of restitution. Again, this section is not applicable to the instant case because no restitution had been previously ordered at the time of sentencing, and therefore, the Board is not limited by section 77-27-5(1)(e) to a specific restitution amount previously determined by a court. In fact, section 77-27-5(1)(e) implicitly supports the Board's authority to assess restitution in cases in which restitution has not been ordered by the trial court at the time of sentencing. By stating that the Board is limited in the amount of restitution amount it may assess in instances where restitution has been ordered by the trial court at the time of sentencing, section 77-27-5(1)(e)

necessarily implies that there are other instances in which the Board is not likewise limited in the amount of restitution it may order. Because Judge Lewis's reading of the statute would effectively render this portion meaningless and void, such interpretation cannot stand. See Nelson v. Salt Lake County, 905 P.2d 872, 876 (Utah 1995); accord Ferro v. Utah Dep't of Commerce, 828 P.2d 507, 513 (Utah App. 1992).

Like section 77-27-5, section 77-27-6 also provides support for the Board's authority to order restitution. That section states, in pertinent part:

When the Board of Pardons and Parole orders the release of an inmate who has been sentenced to make restitution pursuant to Section 76-3-201 or whom the board has ordered to make restitution, and all or a portion of restitution is still owing, the board may establish a schedule including both complete and court-ordered restitution, by which payment of the restitution shall be made, or order community or other service in lieu of or in combination with restitution.

Utah Code Ann. § 77-27-6(1) (1995) (emphasis added). Clearly, the use of the disjunctive, "or," contemplates that the Board may, by its own authority, order restitution.

Moreover, even if the district court correctly read the language of sections 77-27-5 and 77-27-6 as expressly authorizing the Board to order restitution in the two specific instances laid out in subsections 77-27-6(2) and -6(3), there is nothing in

those sections, or elsewhere in state law, that limits the Board to assessing restitution only in such cases. Because the Board's authority is not thereby limited, the Board's action is proper, even if not expressly authorized, under its general authority to "determine by majority decision when and under what conditions . . . persons committed to serve sentences in . . . all felony cases . . . may be released upon parole." Utah Code Ann. § 77-27-5(1)(a) (1995).

In any event, the district court's interpretation of sections 77-27-5 and 77-27-6 as prohibiting the Board from ordering restitution in this case is clearly contrary to the plain language contained therein and is, therefore, incorrect as a matter of law.

**II. THE DISTRICT COURT ERRED IN DETERMINING
THAT THE BOARD'S ASSESSMENT OF RESTITUTION AS
A CONDITION OF STILLING'S PAROLE VIOLATED THE
UTAH CONSTITUTION'S PROHIBITION AGAINST
EX POST FACTO LAWS**

As an alternative ground for its ruling, the district court held that the Board's assessment of restitution against Stilling in the instant case violated the Utah Constitution's prohibition against ex post facto laws. Except for stylistic changes, the above versions of sections 77-27-5 and 77-27-6 became effective on April 1, 1985. Pursuant to the authority granted by those

sections, restitution was ordered by the Board as a condition of Stilling's parole in April 1994. However, the district court held that since Stilling was originally sentenced for the three underlying aggravated robbery offenses in February 1985, application of sections 77-27-5 and 77-27-6 to him would increase his punishment and therefore such application would be ex post facto. Respondents respectfully disagree.

Article I, section 18 of the Utah Constitution states: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed." "An ex post facto law is one that, inter alia, 'makes more burdensome the punishment for a crime, after its commission.'" State v. Burgess, 870 P.2d 276, 278 n.3 (Utah App. 1994) (quoting State v. Norton, 675 P.2d 577, 585 (Utah 1983), cert. denied, 466 U.S. 942 (1984), overruled on other grounds by State v. Hansen, 734 P.2d 421 (Utah 1986)).

However, in the instant case, assessment of restitution under section 77-27-5 as a condition of parole does not increase Stilling's punishment. As always, his sentence is three one-to-fifteen year terms, and Stilling had the option to reject the conditions of parole and serve out the remainder of his sentence. Mansell v. Turner, 14 Utah 2d 352, 353, 384 P.2d 394,

395 (Utah 1963). The imposition of restitution as a condition of parole is simply that, a condition to Stilling being permitted the privilege of parole. Thus, no violation of the ex post facto provision of the Utah Constitution has occurred. See Burgess, 870 P.2d at 278 n.3; Norton, 675 P.2d at 586.

Other states have reached a similar conclusion. In White v. People, 866 P.2d 1371 (Colo. 1994) (en banc), the Colorado Supreme Court held that requiring parolee to participate in a sex offender treatment program that did not exist when parolee was originally sentenced did not constitute additional punishment, but merely the denial of the privilege of parole. Consequently, such a requirement did not violate ex post facto clause. Id. at 1374. Similarly, in Mellinger v. Idaho Dep't of Corrections, 757 P.2d 1213 (Idaho App. 1988), the Idaho Court of Appeals held that conditions of parole are not additional punishments for the crime for which parolee was incarcerated, but simply grounds for losing parole. Id. at 1218.

Furthermore, it is well settled that parole proceedings are not criminal proceedings. Thus, the Utah Supreme Court has stated that double jeopardy guarantees are not violated "when a defendant is convicted of criminal charges and those same facts are used as grounds for revoking the defendant's parole."

Johns v. Shulsen, 717 P.2d 1336, 1337 (Utah 1986) (citing State v. Bullock, 589 P.2d 777 (Utah 1979)); accord Hatch v. Deland, 790 P.2d 49, 51 (Utah App. 1990), abrogated on other grounds by Labrum v. Bd. of Pardons, 870 P.2d 902 (Utah 1993). Similarly, since parole proceedings are not criminal in nature, the imposition of restitution as a condition of parole following such a hearing cannot be viewed as the imposition of a second punishment for the underlying crime.

"A statutory amendment does not violate the ex post facto clause merely because it works to the detriment of the accused." Norton, 675 P.2d at 585 (citing Beazell v. Ohio, 269 U.S. 167, 170 (1925)). It must also affect an accrued right of the accused. Id. at 586. In this case, Stilling's sentence has not changed. The change at issue here is simply a change in the law regarding conditions of parole. Since no expectation of certain conditions of parole accrued to Stilling until the time of his parole hearing, well after sections 77-27-5 and 77-27-6 were passed, application of those sections to him cannot be said to be applied ex post facto.

Moreover, Andrews v. Utah Board of Pardons, 836 P.2d 790, 793 (Utah 1992), upon which the district court relied in support of its conclusion that application of sections 77-27-5 and

77-27-6 to Stilling is ex post facto, is readily distinguishable. In Andrews, the Utah Supreme Court, in the context of deciding whether to grant Andrews' petition for a commutation hearing, held that application of substantive standards that had been passed subsequent to the time at which the crime was committed would diminish Andrews' opportunity for commutation in violation of article I, section 18 of the Utah Constitution. Id. at 793. However, in the present case, the Board had plenary authority to order restitution both at the time that Stilling committed the underlying offenses and at the time of his parole hearing. Thus, Andrews is not controlling here.

At the time the underlying offenses were committed, the case law clearly supported the Board's plenary authority, absent an abuse of discretion, to place conditions including restitution on parole. As stated by the Utah Supreme Court, "The plenary authority of the Board of Pardons should not be disturbed in the absence of a clear abuse of its rightful discretion." Ward v. Smith, 573 P.2d 781, 782 (1978).¹ See also Utah Code Ann.

¹Stilling claims that the Board lost its plenary power after article VII, section 12 of the Utah Constitution was amended in 1980 to give the legislature authorization to enact standards governing when persons convicted of various crimes are eligible for parole. However, that amendment did not eliminate the Board's plenary power. In fact, in State v. Kent, 665 P.2d 1317

§ 77-27-1 (1982) (defining parole as release from imprisonment on conditions prescribed by the Board which the parolee must satisfactorily perform in order to be entitled to a termination of sentence). In fact, even banishment has been upheld as a valid condition of parole. Mansell v. Turner, 14 Utah 2d 352, 384 P.2d 394 (1963). The breadth of the Board's plenary powers was plainly set forth in section 77-27-3, which stated that "[t]he board of pardons shall determine, by majority decision, when and under what conditions, subject to the provisions of this chapter, persons now or hereafter serving sentences, in all cases except treason or impeachments, or as otherwise limited by law, may be released upon parole." Utah Code Ann. § 77-27-3(1) (1982). That section additionally provided that "[t]he determinations and decisions of the board of pardons in cases involving approval or denial of any action whatsoever . . . shall

(Utah 1983), a post-amendment case, the Utah Supreme Court expressly reaffirmed the position it took in Ward, stating:

"Parole is a conditional release, the condition being that the prisoner make good or be returned to serve his unexpired time. It is a privilege, an act of grace, as distinguished from a right. Parole is not absolute liberty as all law-abiding citizens enjoy, but only conditional liberty dependent upon compliance with parole restrictions. The parolee remains in legal custody until such time as his sentence is terminated."

Kent, 665 P.2d at 1319 (quoting Ward, 573 P.2d at 782) (footnotes omitted).

be final." Utah Code Ann. § 77-27-3(2) (1982). Thus, even prior to the express authority to order restitution found in sections 77-27-5 and 77-27-6, the Board had the implicit authority to order restitution under its plenary powers.

Similarly, after sections 77-27-5 and 77-27-6 were amended, the Board continued to have the authority to order restitution. "Decisions of the Board of Pardons in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review." Utah Code Ann. § 77-27-5(3) (1995) (emphasis added). Accordingly, application of sections 77-27-5 and 77-27-6 to Stilling is not ex post facto because the enactment of those sections did not diminish Stilling's rights.

**III. THE DISTRICT COURT ERRED IN DETERMINING
THAT ALLOWING THE BOARD TO ASSESS RESTITUTION
AS A CONDITION OF PAROLE EXCEEDS THE
AUTHORITY GRANTED IT BY ARTICLE VII, SECTION
12 OF THE UTAH CONSTITUTION**

In rendering its decision in this matter, the district court did not directly address Stilling's claim that permitting the Board to order restitution in the present case would exceed the authority granted the Board under article VII, section 12 of the Utah Constitution. However, the court did suggest that result when it stated that it would be improper to allow the Board

"to don the robe of the judiciary and decide the amount of restitution owed as a result of the underlying criminal act when restitution was not ordered in the original sentencing proceeding." Therefore, it is necessary for respondents to address petitioner's article VII, section 12 claim.

When faced with a constitutional challenge to a statute, "the act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality." Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993). "Additionally, while we must give effect to constitutional mandates, we must also attempt to reconcile the challenged statute with the constitution, particularly if the constitutional mandate is subject to more than one reasonable interpretation." State v. Robertson, 886 P.2d 85, 87 (Utah App. 1994) (citing Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy Dist., 690 P.2d 562, 564 (Utah 1984)), cert. granted, 899 P.2d 1231 (Utah 1995). In other words, this Court will "afford the statute every presumption of validity, so long as there is a reasonable basis upon which both provisions of the statute and the mandate of the constitution may be reconciled." Timpanogos, 690 P.2d at 564.

Article VII, section 12 of the Utah Constitution provides in pertinent part:²

(2) (a) The Board of Pardons and Parole, by majority vote and upon other conditions as provided by statute, may grant parole, remit fines, forfeitures and restitution orders, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to regulations provided by statute.

Utah Const. art. VII, § 12 (Supp. 1995).

Stilling claims that since this section does not specify that the Board may order restitution, the Board is therefore forbidden from doing so. However, this is not necessarily so. As the Tenth Circuit Court of Appeals recently stated in

²Prior to its 1992 amendment, article VII, section 12 stated in relevant part:

Until otherwise provided by law, the Governor, Justices of the Supreme Court and Attorney General shall constitute a Board of Pardons, a majority of whom, including the Governor, upon such conditions as may be established by the Legislature, may remit fines and forfeitures, commute punishments, and grant pardons after convictions, in all cases except treason and impeachment, subject to such regulations as may be provided by law, relative to the manner of applying for pardons; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except after a full hearing before the Board, in open session, after previous notice of the time and place of such hearing has been given.

Utah Const., art. VII, § 12 (1991). However, since the 1992 amendment did not substantively change this section, respondents will refer to this section in its current format.

United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir. 1990):

“The motto of the Prussian state--that everything which is not permitted is forbidden--is not a helpful guide to statutory interpretation.” Id. at 1437 n.3 (quoting United States v. Torres, 751 F.2d 875, 880 (7th Cir. 1984)); accord Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1407 (5th Cir. 1993), cert. denied, --- U.S. ---, 114 S. Ct. 882 (1994); see also State v. Hutchinson, 624 P.2d 1116, 1121-1126 (Utah 1980) (holding that local governments have independent authority apart from, and in addition to, specific legislative grants of authority, to engage in activities reasonably related to the exercise of the powers granted them). The same can be said of constitutional interpretation in the present case: Simply because the Utah Constitution does not specify that the Board may order restitution does not indicate that the Board is constitutionally prohibited from doing so.

To the contrary, it is well settled that an agency of the executive branch which has been granted powers under the Utah Constitution is not strictly limited solely to the enumerated powers set forth in the constitution. For instance, Howell v. County Bd. ex rel. IHC Hospitals, Inc., 881 P.2d 880 (Utah 1994), the Utah Supreme Court held that in order to carry out its

constitutional mandate, the Utah State Tax Commission necessarily had authority in addition to the powers expressly given it in the constitution. Id. at 889-90. Specifically, the court determined that the tax commission had the authority to promulgate a set of uniform standards governing charitable exemptions. Id. at 889. Moreover, it reached this conclusion despite the fact that this authority is not expressly granted the tax commission in the constitution. Similarly, in the present case, despite the fact that article VII, section 12, does not expressly state that the Board of Pardons may order restitution, it does not forbid it, and must be read in conjunction sections 77-27-5 and 77-27-6 to allow it.

This is especially so here in light of the general enabling language of article VII, section 12 that "[t]he Board of Pardons . . . may grant parole . . . subject to regulations provided by statute." Thus, the Legislature did not circumvent the Utah Constitution by enacting sections 77-27-5 and 77-27-6, but merely provided more definition to the Board's constitutionally-mandated power to grant parole. Likewise, in the instant case, the Board simply exercised its constitutional power to grant parole subject to the regulations provided in sections 77-27-5 and 77-27-6. As such, the Board did not exceed its constitutional authority.

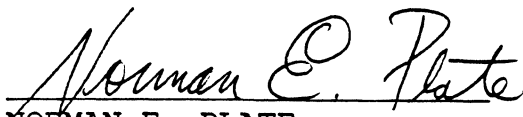
Finally, as the Utah Supreme Court has previously recognized: "For all intents and purposes, adoption of this indeterminate sentencing system transformed the Board from an agency having the ability to shorten a prisoner's judge-determined sentence into an agency with power analogous to that of a court to actually impose a sentence." Neel v. Holden, 886 P.2d 1097, 1101 (Utah 1994). Thus, given Utah's indeterminate sentencing scheme, allowing the Board to "don the robes of the judiciary" in these circumstances is not only permitted, but proper. See Labrum v. Bd. of Pardons, 870 P.2d 902, 908 (Utah 1993); Foote v. Utah Bd. of Pardons, 808 P.2d 734, 735 (Utah 1991).

CONCLUSION

On the basis of the foregoing, the district court's order granting summary judgment in favor of petitioner Steven M. Stilling should be reversed.

Respectfully submitted this 21st day of February, 1996.

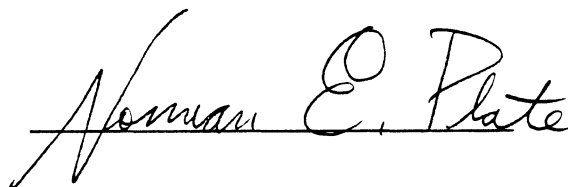
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and accurate copies of the foregoing Brief of Appellants, postage prepaid, to the following counsel of record this 21st day of February, 1996:

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A handwritten signature in cursive script, reading "Norman E. Plate", written over a horizontal line.

ADDENDUM "A"

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

Steven M. Stilling,	:	MEMORANDUM DECISION
Petitioner,	:	
vs.	:	
	:	Case Number 940904258
	:	Judge Leslie Lewis
Utah Board of Pardons and Parole;	:	
O. Lane McCotter, Executive	:	
Director, Utah Department of	:	
Corrections; and the State of Utah,	:	
Respondents.	:	

This case is before the Court on Mr. Stilling's motion for summary judgment. Mr. Stilling was sentenced on February 13, 1985. On May 24, 1994, the Utah Board of Pardons and Parole ("Board") granted Mr. Stilling a parole date conditioned upon his payment of restitution. The Board's order dated June 2, 1995 is difficult to read, but it appears to list the restitution owed as "\$6613.57 (on #CR 83-176); \$17,305.00 (on #16269, #16272 and #16271), and \$92.00 (on Extradition case #90-1900390)." The petitioner contends that the Board is not authorized to order him to pay the \$17,305.00 identified with case numbers 16269, 16272 and 16271 since he was not ordered to pay restitution in the underlying sentence.¹

¹This claim is set forth in the Petition for Extraordinary Relief on page 4, paragraph 15. The Respondent incorrectly asserts in its Memorandum in Opposition to the Motion for Summary Judgment that the Petitioner complains about a case in which the judge has ordered restitution.

The Board's position is that Utah Code §77-27-5, authorizes it to order restitution even if there is no court order of restitution. That statute was passed February 26, 1985 and was effective April, 1985. The petitioner's position is that application of §77-27-5 and §77-27-6 to him, violates the ban against *ex post facto* laws since he was sentenced on February 13, 1985, a few months before the statutes' effective date,² and application of this law increases the punishment imposed. The State's response to this argument is that application of the law is not *ex post facto* since the statute was effective on the date that petitioner was paroled, and the order of restitution does not increase the punishment but is a mere condition of parole. Alternatively, the State opines that the Board had plenary power to order restitution on the date that petitioner was sentenced.

After a careful study of Utah Code §77-27-5 and §77-27-6, the Court finds that the Board is authorized to impose restitution in two limited contexts. First, the Board may impose or enforce any court order for restitution, under Utah Code §77-27-6(2). Second, the Board may order restitution for costs that arise due to the petitioner's needs or conduct and incurred by the Department of Corrections or the state or any other agency. Utah Code §77-27-6(3). However, the Board is not authorized by this statute to order restitution for pecuniary loss related to the underlying offense when restitution was not a part of the sentencing court's order.

²Actually, the defendant's position is that the 1986 amendments to §77-27-5 and §77-27-6 do not apply to him. However, the statutes were actually effective in 1985, with minor amendments being made in 1986. However, this confusion on the part of the defendant does not change the fact that the statute was effective after he was sentenced.

Utah Code §77-27-5 describes the Board's authority. The pertinent sections are set out below:

77-27-5 Board of Pardons and Parole authority.

(1)(a) The Board of Pardons and Parole shall determine by majority decision when and under what conditions, *subject to this chapter and other laws of the state*, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, *restitution ordered*, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.

(1)(e) The board shall determine restitution in an amount that does not exceed complete restitution³ *if determined by the court in accordance with Section 76-3-201*.

77-27-6 Payment of restitution.

(1) When the Board of Pardons and Parole orders the release on parole of an inmate *who has been sentenced* to make restitution pursuant to Section 76-3-201 or whom the board has ordered to make restitution, and all or a portion of restitution is still owing, the board may establish a schedule, including both complete and court-ordered restitution, by which payment of the restitution shall be made, or order community or other service in lieu of or in combination with restitution. In fixing the schedule and supervising the paroled offender's performance, the board may consider the factors specified in Subsection 76-3-201(4).

(2) The board may impose any court order for restitution and order that a defendant make restitution in an amount not to exceed the pecuniary damages to the victim of the offense of which the defendant has been convicted, the victim of any other criminal conduct admitted to by the defendant to the sentencing court, or for conduct for which the defendant has agreed to make restitution as a part of a plea agreement, unless the board applying the criteria as set forth in Subsection 76-3-201(4) determines that restitution is inappropriate.

(3) The board may also make orders of restitution for recovery of any or all costs incurred by the Department of Corrections or the state or any other agency arising out of the defendant's needs or conduct.

[emphasis added]

The general authority of the Board to order restitution is granted in Section 77-27-5; however, that authority is limited by the language, "subject to this chapter and other laws of the

³"Complete restitution means the restitution necessary to compensate a victim for all losses caused by the defendant." Utah Code §76-3-201(4)(c)(i).

State" emphasized above. Limits on the Board's authority to order restitution are described in Section 77-27-5(1)(e) and in Section 77-27-6. First, the Board may only order an amount of restitution that does not exceed the sentencing court's determination of the amount necessary to compensate the victim for all losses caused by the defendant, if the court considered and determined complete restitution was required. The implication of this language is that if the sentencing court did not order complete restitution, the Board may not stand in the place of the court and make a judicial determination of restitution.

The Board's authority to order restitution is further delineated in Section 77-27-6, entitled "Payment of restitution." That statute clearly states that the Board may impose any court order for restitution, or the Board may make orders of restitution for recovery of any or all costs arising out of the defendant's needs or conduct and incurred by the Department of Corrections, the state, or any other agency. Those are the only two situations in which the Board is authorized to order restitution. The statute does not authorize the Board to don the robe of the judiciary and decide the amount of restitution owed as a result of the underlying criminal act when restitution was not ordered in the original sentencing proceeding.⁴

⁴The Court disagrees with the petitioner's statement that "in enacting Utah Code Ann. §§77-27-5 and 6 (Rep. Vol. 8B 1995), the legislature attempted to grant judicial power to the Board because those provisions specifically reference the statutory standard [i.e. §77-3-201] to be employed by sentencing judges as the standards to govern the Board as well" (Petitioner's Memorandum In Support Of Petitioner's Motion For Summary Judgment, p.3.) A careful reading of the statute reveals that it directs the Board to use the criteria of §77-3-201 when fixing the schedule and supervising the offender's repayment performances (§77-27-6(1)) or in making a determination that restitution is inappropriate (§77-27-6(2)). Although the statute is poorly drafted and confusing, the legislature has not granted the Board power to *sua sponte* sentence an offender to pay restitution for pecuniary damages of the underlying crime when restitution was not a part of the court's order.

Further support for the Court's position is found in Utah Code §76-3-201(4). This section directs the court to order restitution where appropriate, and sets out very specific criteria and procedures that the court is to follow. If the court determines that restitution is appropriate, the court must set out specific reasons for its decision as a part of the court record, and if the defendant objects to the imposition, amount or distribution of restitution, the court shall allow the defendant a full hearing on that issue at the time of sentencing. Clearly, an order of the Board of Pardons and Parole to pay restitution for the pecuniary costs of the underlying crime deprives the defendant of his rights to a full hearing before a neutral tribunal.

Assuming arguendo that the legislature empowered the Board to order restitution for an underlying offense when restitution was not a part of the original sentence, the Court finds, as an additional basis for this decision and as a matter of law, that the application of Sections 77-27-5 and 77-27-6 to this petitioner is retroactive and increases the punishment and burden on the petitioner. Thus, application of Sections 77-27-5 and 77-27-6 is barred.

The Utah supreme court spoke to the issue of retroactivity in *Andrews v. Utah Bd. of Pardons*, 836 P.2d 790 (Utah 1992). In that case, the court held that amendments to the statutory scheme governing the procedures of the Board (§77-27-5.5) cannot be applied to inmates who committed their crimes prior to the enactment of the new statute if the statute is detrimental to the inmate. *Id.* at 793. Application of such amendments would violate Article I, Section 18 of the Utah Constitution's ban on ex post facto laws as well as Article I, Section 10 of the United States Constitution. *Id.*

Likewise, in *Smith v. Cook*, 803 P.2d 788 (Utah 1990), the Utah Supreme Court used a traditional statutory analysis when considering the retroactive application of a statute. Smith was sentenced under a statute which was later amended so that the length of probation was shortened. The court rejected Smith's argument that the later amendment should apply to his case. The court explained that as a general rule, a statute is applied only prospectively. However, if a statute is considered procedural or remedial then the statute may be applied retroactively. A statute is "considered procedural or remedial, as opposed to substantive, if the statute does not enlarge, eliminate, or destroy vested rights." *Id.* at 792. Because this statute enlarged the rights of a person placed on probation, it was substantive, and therefore could not be applied retroactively. The court also noted that it has consistently held, "the law in force at the time of *sentencing* govern[s] and ... that an amendment to [a] statute passed after sentence has no effect on the matter." *Smith v. Cook*, 803 P.2d 788, 792 (Utah 1990).

The *Smith* court's analysis tracks that of the United States Supreme Court in *Dobbett v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977), wherein the court held that an *ex post facto* statute is one that 'punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for the crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.' (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925)).

Applying the law to the facts in this case, the Court finds that the petitioner was sentenced on February 13, 1985, two months before the effective date of Utah Code 77-27-5 and Utah Code §77-27-6. Therefore, under either the *Smith* or *Andrews* rule, the Court finds that application of the statutes to the petitioner in 1993 was retroactive.

The second prong of the test outlined in *Smith v. Cook*, 803 P.2d 788 (Utah 1990) is whether the change in the law was substantive or procedural. In other words, will the change in the law increase the burden of punishment for the crime? *Dobbert v. Florida*, 97 S.Ct. 2290, 2298 (1977). And more specifically, whether the application of Utah Code §77-27-5 through an order of restitution increases the punishment ordered at sentencing.

In *Matter of Appeal in Maricopa Cty. Juv. Action*, 677 P.2d 943, 944 (Ariz.App. 1984), the court addressed this issue and held that a statutory amendment which authorized the a juvenile court to order restitution operated as an *ex post facto* law when applied to acts which occurred before the act's effective date. To determine whether an act is *ex post facto*, the court must analyze whether the statute has been applied retroactively, and whether the application works a disadvantage to the offender. *Id.* at 945. The court stated that "not only was the sanction for the unlawful activity increased to permit the imposition of a fine and restitution where they were not permissible at the time appellant committed the act, but the conditions of release on parole were modified to make payment of court ordered monetary reimbursement or assessments a condition of release. This is the type of legal disadvantage which was disapproved in *Weaver*." *Id.* at 946.

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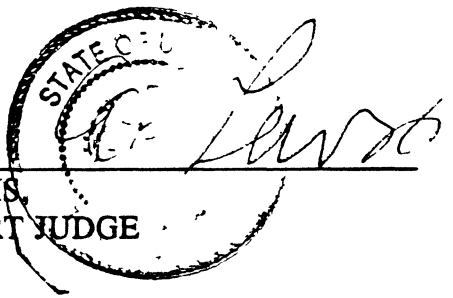
Likewise, in the case at hand, when Stillings was sentenced, the Board of Pardons and Parole did not have even the ostensible authority to order parolees to pay restitution. Clearly such an order, imposed as a condition of parole, substantially increases the punishment imposed by the sentencing court. Therefore, the Court finds that this statute, which purports to authorize the Board to order restitution, is substantive in making the punishment for the crime more burdensome, and is violative of Utah Code §68-3-3, as well as the ban on *ex post facto* laws established by the Utah constitution and the United States Constitution.

The petitioner's Motion for Summary Judgment is granted.

DATED this 12th day of October, 1995.



LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court Order, to the following, this 12th day of October, 1995:

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E. Matheson

ADDENDUM "B"

Utah Const. art. I, section 18

Art. I, § 18

CONSTITUTION OF UTAH

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Elections
§§ 4 to 7.

C.J.S. — 29 C.J.S. Elections § 6.
Key Numbers. — Elections ⇐ 7.

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

History: Const. 1896.

NOTES TO DECISIONS

ANALYSIS

Bill of attainder.
Criminal punishment.
Ex post facto laws.
Impairment of contracts.
Ex post facto.

Bill of attainder.

A bill of attainder is one that imposes guilt, and inflicts punishment, upon an identifiable individual or group without judicial process; county ordinance prohibiting massages by members of the opposite sex, with certain exceptions, was not a bill of attainder where no identifiable individual or group was, by operation of the ordinance alone, the subject of legislative punishment without due process. *Redwood Gym v. Salt Lake County Comm'n*, 624 P.2d 1138 (Utah 1981).

Criminal punishment.

An amendment of a criminal statute which lessens punishment controls the sentence pronounced after the effective date of the amendment, even where pronouncement was delayed by defendant's unlawful failure to appear for sentencing. *Belt v. Turner*, 25 Utah 2d 380, 483 P.2d 425 (1971).

Ex post facto laws.

Law requiring state officers to give bond within certain time after beginning of term, which was enacted subsequent to beginning of term of officer, was not retroactive divesting vested rights, impairing obligation of contract or imposing new obligations. *State ex rel. Stain v. Christensen*, 84 Utah 185, 35 P.2d 775 (1934).

Neither the federal nor state Constitution has any provision in terms prohibiting retroactive legislation — excepting that which forbids the enactment of ex post facto laws. *Garrett Freight Lines v. State Tax Comm'n*, 103 Utah 390, 135 P.2d 523, 146 A.L.R. 1003 (1943).

Impairment of contracts.

Change or limitation of remedy, which does not materially abridge right, does not impair obligation of contract. *Kirkman v. Bird*, 22 Utah 100, 61 P. 338, 58 L.R.A. 669, 83 Am. St. R. 774 (1900); *Salter v. Nelson*, 85 Utah 460, 39 P.2d 1061 (1935).

Former statute which exempted to married men, or heads of families, their earnings from personal services rendered within 60 days next preceding levy of execution, by garnishment or otherwise, held not to have impaired obligation of contracts entered into prior to its enactment. *Kirkman v. Bird*, 22 Utah 100, 61 P. 338, 58 L.R.A. 669, 83 Am. St. R. 774 (1900).

Former law, increasing homestead exemption from \$1000 to \$1500, was not invalid as impairing obligation of contracts. *Folsom v. Asper*, 25 Utah 299, 71 P. 315 (1903).

The power to fix rates having been retained by the state under the Public Utilities Act, the action of the commission in fixing rates to be charged by street railway company notwithstanding city ordinance granting street railway franchise to operate railway over streets, did not in any manner result in impairment of contract. *Murray City v. Utah Light & Traction Co.*, 56 Utah 437, 191 P. 421 (1920).

Regulation of rates for public utilities is governmental function coming directly within police power of state, and for that reason the establishing or modifying of rates, although contractual, does not violate this provision. *United States Smelting, Ref. & Milling Co. v. Utah Power & Light Co.*, 58 Utah 168, 197 P. 902 (1921).

Provision of Workmen's Compensation Act which provides that, when any injury is caused by wrongful act of third person, claimant must elect whether to take compensation under act or to pursue his remedy against third person is valid as against contention that it impairs obligation of contract of employment. *Leva v. Utah Fuel Co.*, 58 Utah 388, 199 P. 659 (1921).

Sec. 12. [Board of Pardons — Respites and reprieves.]

Until otherwise provided by law, the Governor, Justices of the Supreme Court and Attorney General shall constitute a Board of Pardons, a majority of whom, including the Governor, upon such conditions as may be established by the Legislature, may remit fines and forfeitures, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to such regulations as may be provided by law, relative to the manner of applying for pardons; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except after a full hearing before the Board, in open session, after previous notice of the time and place of such hearing has been given. The proceedings and decisions of the Board, with the reasons therefor in each case, together with the dissent of any member who may disagree, shall be reduced to writing, and filed with all papers used upon the hearing, in the office of such officer as provided by law.

The Governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the State, except treason or conviction on impeachment; but such respites or reprieves shall not extend beyond the next session of the Board of Pardons; and such Board, at such session, shall continue or determine such respite or reprieve, or they may commute the punishment, or pardon the offense as herein provided. In case of conviction for treason, the Governor shall have the power to suspend execution of the sentence, until the case shall be reported to the Legislature at its next regular session, when the Legislature shall either pardon, or commute the sentence, or direct its execution; and the Governor shall communicate to the Legislature at each regular session, each case of remission of fine or forfeiture, reprieve, commutation or pardon granted since the last previous report, stating the name of the convict, the crime for which convicted, the sentence and its date, the date of remission, commutation, pardon or reprieve, with the reasons for granting the same, and the objections, if any, of any member of the Board made thereto.

History: Const. 1896; L. 1979, S.J.R. 7.

NOTES TO DECISIONS**ANALYSIS**

Composition of board.
Condition for termination of sentence.
Exclusiveness of pardoning power.
Good time allowances.
Minimum mandatory sentence.
Power to commute punishments.
Suspension of sentence as exercise of pardoning power.

Composition of board.

Legislature is given power and authority to change the personnel of the board of pardons. *Cardisco v. Davis*, 91 Utah 323, 64 P.2d 216 (1937).

The phrase "until otherwise provided by law" in this section means until otherwise provided by Legislature and does not mean until changed by constitutional amendment so that

statute providing for make-up of board of pardons was valid and board had legal status. *Adriano v. Turner*, 20 Utah 2d 350, 437 P.2d 891 (1968).

Condition for termination of sentence.

Condition for termination of sentence imposed by board of pardons that prisoner agree to leave state was not unconstitutional as amounting to banishment. *Mansell v. Turner*, 14 Utah 2d 352, 384 P.2d 394 (1963).

Exclusiveness of pardoning power.

Under this section, only board of pardons has right to commute punishments and grant pardons. *State ex rel. Bishop v. State Bd. of Cors.*, 16 Utah 478, 52 P. 1090 (1898).

Statute, giving power of parole to board of corrections, held invalid as in conflict with this

Sec. 12. [Board of Pardons and Parole — Appointment — Powers and procedures — Governor's powers and duties — Legislature's powers.]

(1) There is created a Board of Pardons and Parole. The Governor shall appoint the members of the board with the consent of the Senate. The terms of office shall be as provided by statute.

(2) (a) The Board of Pardons and Parole, by majority vote and upon other conditions as provided by statute, may grant parole, remit fines, forfeitures and restitution orders, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to regulations as provided by statute.

(b) A fine, forfeiture, or restitution order may not be remitted and a commutation, parole, or pardon may not be granted except after a full hearing before the board, in open session, and after previous notice of the time and place of the hearing has been given.

(c) The proceedings and decisions of the board, the reasons therefor in each case, and the dissent of any member who may disagree shall be recorded and filed as provided by statute with all papers used upon the hearing.

(3) (a) The Governor may grant respites or reprieves in all cases of convictions for offenses against the state except treason or conviction on impeachment. These respites or reprieves may not extend beyond the next session of the board. At that session, the board shall continue or determine the respite or reprieve, commute the punishment, or pardon the offense as provided in this section.

(b) In case of conviction for treason, the Governor may suspend execution of the sentence until the case is reported to the Legislature at its next annual general session, when the Legislature shall pardon or commute the sentence, or direct its execution. If the Legislature takes no action on the case before adjournment of that session, the sentence shall be executed.

History: Const. 1896; L. 1979, S.J.R. 7; 1992, S.J.R. 8, § 6.

Amendment Notes. — The 1992 amendment was proposed by Laws 1992, S.J.R. 8, § 6,

approved by the electors on November 3, 1992, and took effect on January 1, 1993. The amendment rewrote the section.

Sec. 13. [Repealed.]

Repeals. — Laws 1992, S.J.R. 8, § 11 proposed repealing this section, which read "Until otherwise provided by law, the Governor, Attorney General, and State Auditor shall constitute a Board of Examiners, with power to examine all such claims against the State as provided by law, and perform such other duties as provided

by law; and no such claim against the State shall be passed upon by the Legislature without having been considered and acted upon by the Board of Examiners." The repeal was approved by the electors of the state to take effect on January 1, 1993.

Sec. 14. [Duties of Lieutenant Governor.]

The Lieutenant Governor shall:

(1) serve on all boards and commissions in lieu of the Governor whenever so designated by the Governor;

(2) perform such duties as may be delegated by the Governor; and

(3) perform other duties as may be provided by statute.

- 77-27-16. Revocation of parole — Procedure.
- 77-27-17. Discharge from parole — Application of parole time to sentence.
- 77-27-18. County attorney to furnish information.
- 77-27-19. Peace officer status of adult probation and parole section agents.
- 77-27-20. Violating terms of probation.
- 77-27-21. Clinics and examinations.
- 77-27-22. Criminal identification bureau records.
- 77-27-23. Adult probation and parole section created — Parole and probation districts — Employees in classified service.
- 77-27-24. Out-of-state supervision of probationers and parolees — Authority to enter into compacts.
- 77-27-25. Amendments to interstate compacts — Transfer of prisoners — Costs — Supplementary agreements.
- 77-27-26. Deputization of agents to effect return of parole and probation violators.
- 77-27-27. Retaking or reincarceration for parole or probation violations — Hearing and notice to sending state — Detention of parolee or probationer.
- 77-27-28. Hearing officer.
- 77-27-29. Rights of parolee or probationer — Record of proceedings.
- 77-27-30. Violation by parolee or probationer supervised in another state — Hearing in other state — Procedure upon receipt of record from other state.
- 77-27-31. Short title.

77-27-1. Definitions. As used in this chapter:

- (1) "Pardon" is an act of grace by an appropriate authority exempting a person from punishment for a crime;
- (2) "Parole" is a release from imprisonment on prescribed conditions which, if satisfactorily performed by the parolee, entitles him to a termination of his sentence;
- (3) "Commutation" is the change from a greater to a lesser punishment after conviction;
- (4) "Termination" is the act of an appropriate authority discharging from parole or concluding the sentence of imprisonment prior to the expiration of the sentence;
- (5) "Reprieve or respite" is the temporary suspension of the execution of the sentence;
- (6) "Expiration" occurs when the maximum sentence has run; and
- (7) "Probation" is an act of grace by the court suspending the imposition or execution of a convicted offender's sentence upon prescribed conditions.

History: C. 1953, 77-27-1, enacted by L. 1980, ch. 15, § 2.

Cross-References.

Board of pardons, governor's power to grant respites and reprieves, Const. Art. VII, § 12.

Termination or discharge of parolee from sentence, 76-3-202.

DECISIONS UNDER FORMER LAW

Amnesty distinguished.

A pardon was to be distinguished from amnesty in that the former relieved an offender from the consequences of an offense

of which he had been convicted, while amnesty obliterated an offense before conviction. *United States v. Bassett* (1887) 5 U 131, 13 P 237, reversed on another point 137 US 496, 34 L Ed 762, 11 S Ct 165.

77-27-2. Board of pardons within department of social services — Establishment — Membership — Three-member panels — Qualifications and appointment — Terms — Vacancies — Removal. There is established within the department of social services a board of pardons, which shall consist of five part-time members, all of whom shall be resident citizens of the State of Utah, and who shall be appointed by the board of corrections. The board may sit as a panel of three members, the chairman or, in the absence of the chairman, the vice chairman, and two rotating members constituting such a panel. Such panel, by majority decision, may act for the entire board to determine whether parole, pardon, commutation, termination of sentence, or remission of fines and forfeitures shall be granted in individual cases, but a majority decision by the entire board shall be required for adoption of rules, regulations or policies of general applicability pursuant to section 77-27-7. The present members of the state board of pardons are to continue to serve and shall become the members of the board of pardons until the terms for which they were appointed shall expire and until their respective successors shall be appointed and qualified. Thereafter, each member of the board of pardons shall hold office for four years and until his successor shall be appointed and qualified. No member shall serve more than two consecutive terms. Any vacancy occurring in the membership of the board of pardons otherwise than by expiration of the term, shall be filled in the same manner as those occurring by expiration of term, but for the unexpired term only. Any member of the board of pardons may be removed from office prior to expiration of the member's term by the board of corrections for cause, after proper notice and hearing.

History: C. 1953, 77-27-2, enacted by L. 1980, ch. 15, § 2.

Cross-References.

Creation of department of social services and boards and divisions within department, 63-35-3.

Collateral References.

Pardon and Parole ⇐ 5, 14-14.22.
67A CJS Pardon and Parole §§ 6-8, 10, 39-60.
59 AmJur 2d 53-75, Pardon and Parole §§ 77-102.

DECISIONS UNDER FORMER LAW

Constitutionality.

Constitutional provision that "until otherwise provided by law, the governor, justices of the Supreme Court and attorney general shall constitute a board of pardons" meant

until otherwise provided by legislature and did not mean until changed by constitutional amendment; statute providing for make-up of board of pardons was valid. *Adriano v. Turner* (1968) 20 U 2d 350, 437 P 2d 891.

77-27-3. Duties of board — Decisions final — Governor's power — Restitution as condition. (1) The board of pardons shall determine, by majority decision, when and under what conditions, subject to the provisions of this chapter, persons now or hereafter serving sentences, in all cases except treason or impeachments, or as otherwise limited by law, may be released upon parole, pardoned, or have their fines or forfeitures remitted, or their sentences commuted or terminated. No fine or forfeiture

shall be remitted, no parole, pardon or commutation granted or sentence terminated, except after a full hearing before the board in open session and after appropriate prior notice to the defendant of the time and place of the hearing has been given. The orders and decisions of the board of pardons and any dissent thereto shall be reduced to writing.

(2) The determinations and decisions of the board of pardons in cases involving approval or denial of any action whatsoever, of paroles, pardons, commutations or terminations of sentence, or remission of fines and forfeitures shall be final.

(3) Nothing herein shall be construed as a denial of or limitation on the governor's power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment; however, such respites or reprieves shall not extend beyond the next session of the board of pardons and the board, at such session, shall continue or determine such respite or reprieve, or it may commute the punishment, or pardon the offense as herein provided. In the case of conviction for treason, the governor has the power to suspend execution of the sentence, until the case shall be reported to the legislature at its next session, when the legislature shall either pardon or commute the sentence, or direct its execution.

In determining when and where and under what conditions persons now or hereafter serving sentences may be released upon parole, pardoned or have their fines or forfeitures remitted, or their sentences commuted or terminated, the state board of pardons shall consider whether such persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of section 76-3-201, as a condition of any parole, pardon, remission of fines or forfeitures, commutation or termination of sentence.

If the state board of pardons determines that restitution is inappropriate, the state board of pardons shall state in writing as a part of the record of proceedings, the reasons for the decision.

(4) Whenever the state board of pardons orders the release on parole of an inmate who has been sentenced to make restitution pursuant to section 76-3-201, but with respect to whom payment of all or a portion of the restitution was suspended until his release from imprisonment, the board may establish a schedule by which payment of the restitution may be resumed. In fixing the schedule and supervising the paroled inmate's performance thereunder the board may consider the factors specified in section 76-3-201 (3). The board may provide to the sentencing court a copy of the schedule and any modifications thereof.

History: C. 1953, 77-27-3, enacted by L. 1980, ch. 15, § 2; L. 1981, ch. 59, § 3.

(1); and added the last two paragraphs of subsec. (3).

Compiler's Notes.

The 1981 amendment inserted "to the defendant" in the second sentence of subsec.

Collateral References.

Pardon and Parole \Leftrightarrow 5, 14-14.22.
67A CJS Pardon and Parole §§ 6-8, 10, 39-60.

PARDONS AND PAROLES

77-27-5

NOTES TO DECISIONS

ANALYSIS

Constitutionality
Cited

Constitutionality.

Constitutional provision that "until otherwise provided by law, the governor, justices of the Supreme Court and attorney general shall

constitute a board of pardons" meant until otherwise provided by legislature and did not mean until changed by constitutional amendment, statute providing for make-up of board of pardons was valid *Adriano v Turner*, 20 Utah 2d 350, 437 P2d 891 (1968)

Cited in *State v Bishop*, 717 P2d 261 (Utah 1986)

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am Jur 2d Pardon and Parole §§ 10, 12, 17, 73 et seq

C.J.S. — 67A C J S Pardon and Parole §§ 6 to 8, 10, 39 to 60

Key Numbers. — Pardon and Parole ¶ 55

77-27-3. Repealed.

Repeals. — Section 77-27-3 (L 1980, ch 15, § 2, 1981, ch 59, § 3, 1983, ch 88, § 36), relating to duties of the board, hearings, etc., was repealed by Laws 1985, ch 213, § 10

77-27-4. Chairperson and vice chairperson.

(1) The governor shall select one of the members of the board to serve as chairperson and board administrator at the governor's pleasure. The chairperson may exercise the duties and powers, in addition to those established by this chapter, necessary for the administration of daily operations of the board, including personnel, budgetary matters, panel appointments, and scheduling of hearings.

(2) The chairperson shall appoint a vice chairperson to act in the absence of the chairperson.

History: C. 1953, 77-27-4, enacted by L. 1985, ch 198, § 8; 1989, ch. 112, § 1; 1990, ch. 195, § 3.

1985, ch 198, § 8 repealed former § 77-27-4 (L 1980, ch 15, § 2, 1983, ch 53, § 2), relating to chairman and vice chairman and quorum of board, and enacted present § 77-27-4

Repeals and Reenactments. — Laws

77-27-5. Board of Pardons and Parole authority.

(1) (a) The Board of Pardons and Parole shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated

(b) The board may sit together or in panels to conduct hearings. The chair shall appoint members to the panels in any combination and in accordance with rules promulgated by the board, except in hearings involving commutation and pardons. The chair may participate on any

panel and when doing so is chair of the panel. The chair of the board may designate the chair for any other panel.

(c) No restitution may be ordered, no fine, forfeiture, or restitution remitted, no parole, pardon, or commutation granted or sentence terminated, except after a full hearing before the board or the board's appointed examiner in open session. Any action taken under this subsection other than by a majority of the board shall be affirmed by a majority of the board.

(d) A commutation or pardon may be granted only after a full hearing before the board.

(2) (a) In the case of original parole grant hearings, rehearings, and parole revocation hearings, timely prior notice of the time and place of the hearing shall be given to the defendant, the county or district attorney's office responsible for prosecution of the case, the sentencing court, law enforcement officials responsible for the defendant's arrest and conviction, and whenever possible, the victim or the victim's family.

(b) Notice to the victim, his representative, or his family shall include information provided in Section 77-27-9.5, and any related rules made by the board under that section. This information shall be provided in terms that are reasonable for the lay person to understand.

(3) Decisions of the Board of Pardons and Parole in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment.

(4) This chapter may not be construed as a denial of or limitation of the governor's power to grant respite or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment. However, respites or reprieves may not extend beyond the next session of the Board of Pardons and Parole and the board, at that session, shall continue or terminate the respite or reprieve, or it may commute the punishment, or pardon the offense as provided. In the case of conviction for treason, the governor may suspend execution of the sentence until the case is reported to the Legislature at its next session. The Legislature shall then either pardon or commute the sentence, or direct its execution.

(5) In determining when, where, and under what conditions offenders serving sentences may be paroled, pardoned, have restitution ordered, or have their fines or forfeitures remitted, or their sentences commuted or terminated, the Board of Pardons and Parole shall consider whether the persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of Section 76-3-201, as a condition of any parole, pardon, remission of fines or forfeitures, or commutation or termination of sentence.

History: C. 1953, 77-27-5, enacted by L. 1985, ch. 213, § 1; 1986, ch. 22, § 2; 1988, ch. 172, § 2; 1990, ch. 195, § 4; 1993, ch. 38, § 102; 1994, ch. 13, § 33.

Repeals and Reenactments. — Laws 1983, ch. 53, § 3 repealed a former § 77-27-5 (L 1980, ch. 15, § 2), relating to per diem and expenses of board members, and enacted a new § 77-27-5.

Laws 1985, ch. 213, § 1 repealed former § 77-27-5 (L 1983, ch. 53, § 3), relating to

compensation and expenses of board and enacted the present section.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, inserted "or district" near the middle of Subsection (2)(a).

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" throughout the section and substituted "chair" for "chairperson" throughout Subsection (1)(b).

History: C. 1953, 77-24-1, enacted by L. 1992, ch. 10, § 1; 1995, ch. 104, § 1. **Amendment Notes.** — The 1995 amendment, effective May 1, 1995, added Subsection (1)(d) and made related changes.

77-24-1.5. Safekeeping by officer pending disposition — Records required — Stray animals.

- (1) Each peace officer shall:
 - (a) hold custodial property in safe custody:
 - (i) until it is received into evidence; or
 - (ii) if it is not used as evidence, until it can be disposed of as provided in this chapter; and
 - (b) maintain a proper record of the custodial property that identifies:
 - (i) the owner of the custodial property, if known; and
 - (ii) the case for which it was taken or received and is being held.
- (2) (a) Each municipal or county animal control officer shall hold any unidentified or unclaimed stray dog or stray cat in safe and humane custody for a minimum of three working days after the time of impound prior to making any final disposition of the animal, including:
 - (i) placement in an adoptive home; or
 - (ii) euthanasia.
- (b) An unidentified or unclaimed stray dog or stray cat may be euthanized prior to the completion of the three working day minimum holding period to prevent unnecessary suffering due to serious injury or disease, if the euthanasia is in compliance with written established agency or department policies and procedures, and with any local ordinances allowing the destruction.
- (c) An unidentified or unclaimed stray dog or stray cat shall be returned to its owner upon proof of ownership and upon compliance with requirements of local animal control ordinances.

History: C. 1953, 77-24-1.5, enacted by L. 1992, ch. 10, § 2; 1995, ch. 104, § 2. **Amendment Notes.** — The 1995 amendment, effective May 1, 1995, redesignated former Subsections (1) and (2) as Subsections (1)(a) and (1)(b) and added Subsection (2).

CHAPTER 27

PARDONS AND PAROLES

Section		formation system — Law enforcement and courts to report — Registration — Penalty — Temporary releases — Effect of expungement.
77-27-5.	Board of Pardons and Parole authority.	
77-27-6.	Payment of restitution.	
77-27-9.	Parole proceedings [Effective April 29, 1996].	
77-27-21.5.	Sex offender registration — In-	

77-27-5. Board of Pardons and Parole authority.

- (1) (a) The Board of Pardons and Parole shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released

upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.

(b) The board may sit together or in panels to conduct hearings. The chair shall appoint members to the panels in any combination and in accordance with rules promulgated by the board, except in hearings involving commutation and pardons. The chair may participate on any panel and when doing so is chair of the panel. The chair of the board may designate the chair for any other panel.

(c) No restitution may be ordered, no fine, forfeiture, or restitution remitted, no parole, pardon, or commutation granted or sentence terminated, except after a full hearing before the board or the board's appointed examiner in open session. Any action taken under this subsection other than by a majority of the board shall be affirmed by a majority of the board.

(d) A commutation or pardon may be granted only after a full hearing before the board.

(e) The board shall determine restitution in an amount that does not exceed complete restitution if determined by the court in accordance with Section 76-3-201.

(2) (a) In the case of original parole grant hearings, rehearings, and parole revocation hearings, timely prior notice of the time and place of the hearing shall be given to the defendant, the county or district attorney's office responsible for prosecution of the case, the sentencing court, law enforcement officials responsible for the defendant's arrest and conviction, and whenever possible, the victim or the victim's family.

(b) Notice to the victim, his representative, or his family shall include information provided in Section 77-27-9.5, and any related rules made by the board under that section. This information shall be provided in terms that are reasonable for the lay person to understand.

(3) Decisions of the Board of Pardons and Parole in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment, including restitution as provided in Section 77-27-6.

(4) This chapter may not be construed as a denial of or limitation of the governor's power to grant respite or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment. However, respites or reprieves may not extend beyond the next session of the Board of Pardons and Parole and the board, at that session, shall continue or terminate the respite or reprieve, or it may commute the punishment, or pardon the offense as provided. In the case of conviction for treason, the governor may suspend execution of the sentence until the case is reported to the Legislature at its next session. The Legislature shall then either pardon or commute the sentence, or direct its execution.

(5) In determining when, where, and under what conditions offenders serving sentences may be paroled, pardoned, have restitution ordered, or have their fines or forfeitures remitted, or their sentences commuted or terminated, the Board of Pardons and Parole shall consider whether the persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of Section 76-3-201, as a condition of any parole, pardon, remission of fines or forfeitures, or commutation or termination of sentence.

History: C. 1953, 77-27-5, enacted by L. 172, § 2; 1990, ch. 195, § 4; 1993, ch. 38, § 102; 1994, ch. 13, § 33; 1995, ch. 301, § 4.
1985, ch. 213, § 1; 1986, ch. 22, § 2; 1988, ch.

NOTES TO DECISIONS

Retroactive application.

— Constitutionality.

For the Board of Pardons to apply the substantive standards in Subsections (6) and (7) of this section in deciding whether to grant a petition for a commutation hearing would di-

minish the opportunity for commutation that was available at the time the crime was committed, in violation of Utah Const., Art. I, Sec. 18, prohibiting *ex post facto* laws. *Andrews v. Utah Bd. of Pardons*, 836 P.2d 790 (Utah 1992).

77-27-6. Payment of restitution.

(1) When the Board of Pardons and Parole orders the release on parole of an inmate who has been sentenced to make restitution pursuant to Section 76-3-201 or whom the board has ordered to make restitution, and all or a portion of restitution is still owing, the board may establish a schedule by which payment of the restitution shall be made, or order community service in lieu of or in combination with restitution. In fixing the schedule and supervising the paroled offender's performance, the board may consider the factors specified in Subsection 76-3-201(3).

(2) The board may impose any court order for restitution and order that a defendant make restitution in an amount not to exceed the pecuniary damages to the victim or victims of the offense of which the defendant has been convicted, or the victim of any other criminal conduct admitted to by the defendant to the sentencing court, unless the board applying the criteria as set forth in Subsection 76-3-201(3)(b) determines that restitution is inappropriate.

(3) The board may also make orders of restitution for recovery of any or all costs incurred by the Department of Corrections or the state or any other agency arising out of the defendant's needs or conduct.

(4) If parole is terminated or the sentence expires while restitution is still owed, the Board of Pardons and Parole shall forward a restitution order to the sentencing court to be entered on the judgment docket. The entry shall constitute a lien and is subject to the same rules as a judgment for money in a civil judgment.

History: C. 1953, 77-27-6, enacted by L. 1985, ch. 213, § 2; 1986, ch. 22, § 3; 1993, ch. 124, § 1; 1994, ch. 13, § 35.

Repeals and Reenactments. — Laws 1985, ch. 213, § 2 repealed former § 77-27-6 (L. 1980, ch. 15, § 2), relating to meetings of the board, and enacted present § 77-27-6.

Amendment Notes. — The 1993 amend-

ment, effective May 3, 1993, added subsection designations and Subsection (4).

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsections (1) and (4).

Cross-References. — Judgments, U R C.P. 54 et seq

77-27-7. Parole or hearing dates — Interview — Hearings — Report of alienists — Mental competency.

(1) The Board of Pardons and Parole shall determine within six months after the date of an offender's commitment to the custody of the Department of Corrections, for serving a sentence upon conviction of a felony or class A misdemeanor offense, a date upon which the offender shall be afforded a hearing to establish a date of release or a date for a rehearing, and shall promptly notify the offender of the date.

(2) Before reaching a final decision to release any offender under this chapter, the chair shall cause the offender to appear before the board, its panel,